UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

TERRI ARSENAULT,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-94-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether the commissioner erred in concluding that as of the plaintiff's date last insured her depression and numbness in her hands and arms were not severe. I recommend that the court vacate the commissioner's decision and remand for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff remained insured for disability purposes only

[1]This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 17, 1999 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations and case authority and page references to the administrative record.

through September 30, 1993, Finding 1, Record p. 18; that her statements concerning her impairment and its impact on her ability to work at the time her insured status expired were not entirely credible, Finding 3, Record p. 18; that on September 30, 1993 she did not have any impairment that significantly limited her ability to perform basic work-related functions and therefore did not have a severe impairment, Finding 4, Record p. 18; and that she was not under a disability at any time through September 30, 1993, Finding 5, Record p. 18.[2] The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

With respect to the plaintiff's SSD application the administrative law judge reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald* v. *Secretary of Health & Human Servs*., 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability

[2]The administrative law judge also determined that as of the time of hearing the plaintiff suffered from a degenerative disc disease of the cervical spine that met the criteria listed in Appendix 1 to Subpart P, 20 C.F.R. § 404. Findings 6-8, Record pp. 18-19. The plaintiff hence was found eligible for Supplemental Security Income payments, which do not depend on insured status. *Id*. at 15.

at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *McDonald*, 795 F.2d at 1124 (quoting Social Security Ruling 85-28).

The plaintiff asserts that (i) the finding of no severe impairment as of the date last insured is not supported by substantial evidence, and (ii) the administrative law judge improperly evaluated her credibility and complaints of pain. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 6) at 4-12. On the basis of one identified flaw — improper assessment of the plaintiff's mental condition as of her date last insured — remand is warranted.

I. Analysis

The plaintiff complains *inter alia* that the administrative law judge erred in deeming her impairments non-severe as of her date last insured inasmuch as he failed to follow the proper procedure for evaluating a claimant's mental state. *Id*. at 4-5. I agree.

The administrative law judge found, and the record reflects, that the plaintiff "was assessed with depression in 1993, at a time when her father was suffering from a terminal illness." Record p. 16; *see also id.* at 122, 124 (records of treating physician James Eshleman, D.O., noting "depression" as of September 7, 1993, December 9, 1993). The plaintiff's father died on September 8, 1993, *id*. at 30, prior to the expiration of her date last insured. An administrative law judge need not complete a PRTF if he or she finds that there is no mental impairment. 20 C.F.R. § 404.1520a(b)(2). Here, however, the administrative law judge determined that the plaintiff did suffer from a mental impairment, which he judged to be non-severe, prior to her date last insured. Record p. 16. A PRTF accordingly should have been completed, 20 C.F.R. §§ 404.1520a(b)-(d), but none

was.[3]

Although remand is warranted on this basis alone, I will for the guidance of the parties briefly address the plaintiff's remaining statements of error, none of which I find persuasive:

1. That the administrative law judge failed to apply Social Security Ruling 83-20 to determine the onset date of the plaintiff's disabling condition. Statement of Errors at 5. Although the administrative law judge did not expressly mention this ruling, his decision sufficiently conforms to its dictates. Ruling 83-20 instructs that

> [i]n disabilities of nontraumatic origin, the determination of onset involves consideration of the applicant's allegations, work history, if any, and the medical and other evidence concerning impairment severity. The weight to be given any of the relevant evidence depends on the individual case.

Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 50. The date alleged by the claimant should be used "if it is consistent with all the evidence available." *Id*. at 51. However, "the established onset date must be fixed based on the facts and can never be inconsistent with the medical evidence of record." *Id.*

The plaintiff testified that she started noticing numbness in her hands in about 1985 and that she could not work between 1990 and 1993 primarily because of numbness in her arms. Record pp. 27, 41. She explained that she did not seek treatment until 1993 because "I'm not a person to complain." *Id*. at 38. In this case, the administrative law judge was not required to adopt the

[3]The plaintiff also complains that the administrative law judge failed to order a consultative examination or use a medical advisor. Statement of Errors at 5. Such a consultation appears advisable in assessing the plaintiff's depression inasmuch as the record contains only Dr. Eshleman's conclusory diagnosis and is devoid of any evidence of the impact of that condition on the plaintiff's capacity to work. The plaintiff suggests that a 1997 consultative examination by Frank Luongo, Ph.D., establishes that as of her date last insured her depression was severe. *Id*. However, Dr. Luongo's report addresses only the plaintiff's mental status as of the date of his examination in 1997. Record pp. 174-78.

plaintiff's assessment of the date on which these conditions became disabling. The record contains substantial medical evidence suggesting that as of September 1993 the plaintiff's hand and arm problems were not particularly pronounced. *See, e.g., id.* at 109-10 (report of Stephan O. Bamberger, M.D., dated January 11, 1996, stating, "She describes noticing some mild numbness in all the fingers of her right hand as far back as eight years ago but didn't think much of it and never sought medical attention. The problem stayed pretty much stable until approximately one year ago when it began to get a lot worse"; plaintiff noticed pain in elbow six months prior to time of examination; denied neck pain at that time); 119 (note of Dr. Eshleman dated April 21, 1995 stating that plaintiff had complained of right arm/wrist/hand numbness and pain since November 1994); 121 (note of Dr. Eshleman apparently dated November 28, 1994 observing that the plaintiff had complained of pain to her right elbow and into her right hand and occasional numbness for two to three months);[4] 142 (note of Leo R. Credit, P.T., dated July 31, 1996 stating with respect to the plaintiff's neck pressure and bilateral upper extremity pain and numbness: "Gradual onset. The patient states noticing numbness in her right hand and her dropping objects in December 1995. She mentions that she has had a stiff neck since May of 1995."). The medical evidence as a whole substantially supports a finding that the plaintiff's hand and arm complaints were non-severe as of her date last insured.[5]

2. That the administrative law judge erred in rejecting the findings of two DDS consulting

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[4]The plaintiff's counsel suggested at the hearing before the administrative law judge that this record dated from January 28, 1994. Record pp. 31-32. However, the document, which is cut off at the edge, records the plaintiff's date of birth as August 9, 1957 and her age as of the date of visit as thirty-seven. *Id.* at 121. This suggests that the actual date of the record was "11/28/94" rather than "1/28/94."

[5]Accordingly, to the extent the administrative law judge erred in not fixing a precise onset date for the plaintiff's diagnosed degenerative disc disease, that error was harmless.

physicians that the plaintiff was restricted to light work as of her date last insured. Statement of Errors at 4-6. The plaintiff overlooks the fact that one of the two DDS reviewers, Paul Brinkman, M.D., qualified his findings as follows: "prior to 1993 (expired DLI) no notation by T/P of any major difficulties." Record p. 108. This is consistent with the administrative law judge's findings.

3. That the administrative law judge improperly assessed the plaintiff's credibility. Statement of Errors at 6-8. The administrative law judge found the plaintiff's "statements concerning her impairment and its impact on her ability to work on the date her insured status expired . . . not entirely credible." Record p. 16. This was so in part because of "the absence of persuasive evidence relating to allegedly disabling impairments prior to September 30, 1993" and statements made by the plaintiff after that date, such as her reported statement to Dr. Bamberger that she did not think much of her hand problems until approximately one year prior to the Bamberger evaluation. *Id*. A failure to seek contemporaneous medical attention may properly be considered by an administrative law judge in assessing a claimant's credibility. *See, e.g., Basinger v. Heckler*, 725 F.2d 1166, 1170 (8th Cir. 1984). An administrative law judge likewise may resolve conflicts in the evidence (*e.g.*, between a claimant's allegations at hearing and his or her reported statements to treating physicians) against the claimant. *See, e.g., Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) ("The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.").[6]

[6]The plaintiff persuasively argues with respect to at least one specific credibility finding that the administrative law judge's assessment was erroneous. Statement of Errors at 6-7. The administrative law judge, relying on Dr. Luongo's report, found the plaintiff's activities in caring for her ailing father (including cooking, feeding, bathing dressing and driving) inconsistent with her (continued...)

4. That the administrative law judge improperly assessed the plaintiff's complaints of pain, eschewing the analytic path required by *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986), and related cases and rulings. Statement of Errors at 8-12. In this case, the plaintiff's own reported statements obviated the need to tread the *Avery* path. Although the plaintiff testified that she has suffered from arthritic-type pain in her hands since 1988, she acknowledged that this pain did not preclude her from working. Record pp. 27-28. Dr. Bamberger noted that her hand condition was stable until approximately January 1995, when it greatly worsened. *Id.* at 109. The plaintiff testified that she left her job at a knitting mill in 1989 because the act of lifting tubes of thread caused her "a lot of discomfort and pain." *Id*. at 29. However, Dr. Eshleman's notes reflect complaints of right arm/wrist/hand numbness and pain commencing as of November 1994 or two to three months prior thereto. *Id*. at 119, 121.[7] Notes dating from 1991-92 office visits disclose no complaints of arm pain or numbness. *Id*. at 127-30. The administrative law judge implicitly discredited the plaintiff's subjective complaints of pain prior to her date last insured for the same reasons he challenged her credibility in general, including inconsistencies in her own reported statements as to the onset of her symptomology. *Id*. at 16. He operated within the bounds of proper

[6](...continued)
allegations of impairment. Record p. 16. However, the administrative law judge overlooked Dr. Luongo's statement that bathing was the only task the plaintiff performed alone; she assisted her aunt in performing the other care duties. *Id*. at 175. Despite this flaw, the administrative law judge's overall credibility assessment is supported by substantial evidence of record.

[7]Dr. Eshleman notes a complaint of legs aching and lumbar somatic dysfunction as of November 8, 1993. Record p. 123. "Lumbar" is defined as pertaining to the "loins," which in turn comprise the "[l]ower part of back and sides between the ribs and pelvis." Taber's Cyclopedic Medical Dictionary at 834-35 (14th ed. 1983). This does not appear relevant inasmuch as the plaintiff testified that she ceased working between 1990 and 1993 primarily because of upper-extremity pain.

discretion in so doing. *See, e.g., Frustaglia*, 829 F.2d at 194 n.1 ("Where there are inconsistencies in the record, the ALJ may discount subjective complaints of pain.").

II. Conclusion

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of November, 1999.

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David M. Cohen
United States Magistrate Judge